

STATE OF SOUTH CAROLINA  
COUNTY OF RICHLAND

BEFORE THE CHIEF PROCUREMENT  
OFFICER FOR CONSTRUCTION

IN THE MATTER OF: BID PROTEST  
DEAS HALL BUILDING RENOVATIONS  
STATE PROJECT H09-9574-PG  
BRANTLEY CONSTRUCTION CO., INC.

DECISION

POSTING DATE: July 16, 2002

vs.

THE CITADEL

This matter is before the Chief Procurement Officer for Construction (CPOC) pursuant to a request from Brantley Construction Company, Inc. (Brantley) under the provisions of §11-35-4210 of the South Carolina Consolidated Procurement Code (Code), for an administrative review on Deas Hall Building Renovation Project (Project) for The Citadel (Citadel). Pursuant to §11-35-4210(3) of the Code, the CPOC evaluated the issues for potential resolution by mutual agreement and determined that mediation was not appropriate. In a written determination attached to this decision, the CPOC concluded that the Bidding Documents, as issued by Citadel, were fatally ambiguous, that Citadel committed administrative error in its evaluation of the bids. Accordingly, the solicitation was cancelled and ordered for resolicitation. There being no issues remaining, Brantley's protest is rendered moot and the protest is dismissed.

### DECISION

It is the decision of the Chief Procurement Officer for Construction that the protest of Brantley Construction Company, Inc., is dismissed as moot.



Michael M. Thomas  
Chief Procurement Officer for Construction

July 16, 2002  
Date

### **STATEMENT OF THE RIGHT TO APPEAL**

The South Carolina Procurement Code, under Section 11-35-4230, subsection 6, states:

A decision under subsection (4) of this section shall be final and conclusive, unless fraudulent, or unless any person adversely affected requests a further administrative review by the Procurement Review Panel under Section 11-35-4410(1) within ten days of the posting of the decision in accordance with Section 11-35-4230(5). The request for review shall be directed to the appropriate chief procurement officer who shall forward the request to the Panel or to the Procurement Review Panel and shall be in writing setting forth the reasons why the person disagrees with the decision of the appropriate chief procurement officer. The person may also request a hearing before the Procurement Review Panel.

Additional information regarding the administrative review process is available on the internet at the following Web site: <http://www.state.sc.us/mmo/legal/lawmenu.htm>

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IN THE MATTER OF: BID PROTEST  
DEAS HALL BUILDING RENOVATIONS  
STATE PROJECT H09-9574-PG  
BRANTLEY CONSTRUCTION CO., INC.

WRITTEN DETERMINATION

POSTING DATE: July 16, 2002

vs.

THE CITADEL

This matter is before the Chief Procurement Officer for Construction (CPOC) pursuant to a request from Brantley Construction Company, Inc. (Brantley) under the provisions of §11-35-4210 of the South Carolina Consolidated Procurement Code (Code), for an administrative review on Deas Hall Building Renovation Project (Project) for The Citadel (Citadel). After review of the matter as outlined below, and pursuant to authority granted under Regulation 19-445.2085 of the SC Code of Laws the solicitation for the Project is hereby canceled.

### **DETERMINATION**

The State does not engage in competitive sealed bidding lightly and the cancellation of an award is a serious matter<sup>1</sup>. Regulation 19-445.2085 states:

*...C. Cancellation Of Award Prior To Performance.*

*When it is determined after an award has been issued but before performance has begun that the State's requirements for the goods or services have changed or have not been met, the award or contract may be canceled and either reawarded or a new solicitation issued, if the Chief Procurement Officer determines in writing that:*

*(1) Inadequate or ambiguous specifications were cited in the invitation;*

*...*

*(7) Administrative error of the procuring agency discovered prior to performance, or...*

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<sup>1</sup> See, for example, *Protest of B&D Marine and Industrial Boilers, Inc.*, Case No. 2002-12 and *Protest of Analytical Automation Specialists, Inc.*, Case No. 1999-1, where the Panel stated, "The Panel encourages CPOs to continue to cautiously and carefully exercise the authority to cancel and resolicit procurements, especially when a protest has been filed."

### **Issue 1–Ambiguous Specifications**

The Project included modifications to the building heating, ventilating and air conditioning (HVAC) systems. One feature of the modified HVAC system was a thermal (ice) storage tank. Included in the Bid Form was the requirement that the bidders furnish prices for the Base Bid work and for each of six Bid Alternates. Four of these Bid Alternates (Nos. 3-6) consisted of thermal storage tanks supplied by different manufacturers. When bids were opened and read aloud, the Bid Forms of four bidders provided a quoted price of “\$0.00” for Bid Alternates 2-6. After an evaluation of the bids, Citadel posted a Notice of Intent to Award to Newton Builders, one of the four that provided a “\$0.00” quotation. A tabulation of the bids [Exh. 1] received is shown below<sup>2</sup>.

<b><u>Bidder</u></b>	<b><u>Base Bid</u></b>	<b><u>Alt 1</u></b>	<b><u>Alt 2</u></b>	<b><u>Alt 3</u></b>	<b><u>Alt 4</u></b>	<b><u>Alt 5</u></b>	<b><u>Alt 6</u></b>
Brantley	\$ 1,525,000	(\$ 6,839)	\$ 174,740	\$ 71,348	\$ 10	\$ 51,742	\$ 116,834
Charleston Const.	\$ 1,684,000	(\$ 6,000)	\$ 83,000	\$ 98,000	\$ 48,000	\$ 48,000	\$ 102,000
Dawson	\$ 1,827,300	(\$ 5,000)	\$ 0	\$ 0	\$ 0	\$ 0	\$ 0
Edison Foard	\$ 1,693,000	(\$ 6,710)	\$ 79,800	\$ 94,500	\$ 46,200	\$ 45,984	\$ 97,480
Hitt Contracting	\$ 1,811,000	(\$ 10,760)	\$ 82,000	\$ 90,000	\$ 22,000	\$ 20,000	\$ 47,000
Infinger & Assoc.	\$ 1,743,000	(\$ 6,260)	\$ 84,000	\$ 100,000	\$ 49,000	\$ 48,000	\$ 103,000
J. A. Jones	\$ 1,876,024	(\$ 8,000)	\$ 163,200	\$ 123,900	\$ 60,480	\$ 60,480	\$ 78,750
Newton Builders	\$ 1,770,000	(\$ 5,000)	\$ 0	\$ 0	\$ 0	\$ 0	\$ 0
Palmetto Const.	\$ 1,860,000	(\$ 6,000)	\$ 0	\$ 0	\$ 0	\$ 0	\$ 0
Stenstrom	\$ 2,045,000	(\$ 5,000)	\$ 0	\$ 0	\$ 0	\$ 0	\$ 0

The Bidding Documents contained in the Project Manual [Exh. 2] included AIA A701-1997, *Instructions to Bidders* (incorporated by reference) and OSE form 00201-OSE, *Standard Supplemental Instructions to Bidders*.

Paragraph 1.5 of the A701 defines the Base Bid and Alternates as follows:

*1.5 The Base Bid is the sum stated in the Bid for which the Bidder offers to perform the Work described in the Bidding Documents as the base, which Work may be added or from which Work may be deleted for sums stated in Alternate Bids.*

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<sup>2</sup> An eleventh bid was received but declared non-responsive for other reasons not relevant to this determination.

Paragraph 5.4.2 of the 00201-OSE states as follows:

*5.4.2 EVALUATION OF BID ALTERNATES. In order to establish a clear and definitive basis of award when the Bidding Documents include Bid Alternates, the following process shall be used.*

*5.4.2.1 When, and only when Bid Alternates are included in the Bid Documents, the Apparent Low Bidder will be determined by combining each Bidder's Base Bid amount and the total amount for all Bid Alternates. The Bidder, who bids the lowest total price for the Base Bid and Bid Alternates, shall be deemed the apparent low bidder.*

*5.4.2.2 Provided that the Agency determines the Apparent Low Bidder to be both responsive and responsible, the Agency shall have the right to award a contract to the Apparent Low Bidder based on any combination of Bid Alternates or no Alternates, unless otherwise specifically provided in the Bidding Documents.*

In summary, the process for determining the Apparent Low Bidder when Bid Alternates are solicited requires the procurement official to determine the arithmetic sum of the Base Bid and all Bid Alternates for each bidder. The Apparent Low Bidder is that bidder who submits the lowest total price. The underlying assumptions in this process are: (1) that the State intends, if bids are favorable, to procure all of the Work<sup>3</sup> solicited; and, (2) that the Bid Alternates conform to the definition given the A701. Restated, this definition requires that each Bid Alternate be a distinct and separable element of Work that can be added or deducted to the contract without reference to the Base Bid or to other Bid Alternates.

Citadel issued Addendum 4 [Exh. 3] to the Bidding Documents (the three previous addenda are not relevant to this protest). Section IV.2 of the Addendum contained the following:

*Section 15450 – THERMAL STORAGE TANKS*

*A. Paragraph 2.1.A.1 “Calmac”: Delete paragraph in its entirety and insert the following additional paragraphs:*

- 1. Do not include cost of thermal storage tanks in the base bid.*
- ...*
- 4. Calmac Tanks (Alternate No. 3)...are the basis of design....*
- 5. Provide thermal storage tanks as manufactured by Calmac as Bid Alternate No. 3.*

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<sup>3</sup> See paragraph 5.17 of the *Manual for Planning and Execution of State Permanent Improvements-Part II*. It is a matter of sound public policy that the State avoids using the competitive bidding process to seek speculative pricing for work it has no reasonable expectation of awarding. See also Paragraph 4.2.1 of AIA A101-97, *Standard Form of Agreement Between Owner and Contractor*, which is contained in 00501-0SE, *Standard Modifications to AIA A101-97*. This paragraph establishes the contractual basis for the Agency’s post-award acceptance of some or all of the Bid Alternates that were not accepted initially.

6. *Provide thermal storage tanks as manufactured by Baltimore Air Coil as Bid Alternate No. 4.*
7. *Provide thermal storage tanks as manufactured by FAFCO as Bid Alternate No. 5.*
8. *Provide “Ice Cell” fiberglass/polyethylene thermal storage tanks as manufactured by Dunham Bush as Bid Alternate No. 6.*

An examination of Bid Alternates 3-6 shows that they fail to meet the standard set in the *Instructions to Bidders*. These Alternates are not distinct and separable elements of Work, but are, in fact, mutually exclusive. Citadel cannot reasonably accept more than one of these Alternates—there will be only one thermal storage tank for the Project. By structuring the Bid Alternates as it did, Citadel made it impossible for itself to both comply with the procedure defined in the Bidding Documents for determining the Apparent Low Bidder and to identify the combination of Base Bid and Bid Alternates that represents a fair and reasonable price for a complete Project. The CPOC believes this conflict made it equally impossible for the bidders to divine Citadel’s ultimate award intentions. This uncertainty is unacceptable and the CPOC finds that the Bidding Documents, as issued, are fatally ambiguous.

#### **Issue 2—Administrative Error by Agency**

In its letter of protest Brantley contended that bids of “\$0.00” are non-responsive and would frustrate Citadel’s attempt to select the most economical combination of Bid Alternates to award. Brantley also argues that the Bid Documents expressly directed that bidders “...not include [the] cost of thermal storage tanks in the base bid.”

The CPOC agrees in part and disagrees in part with Brantley’s arguments. A bid of “\$0.00” is clearly a permissible response—page BF-3 (in paragraph 2 under AGREEMENTS) of the Bid Form includes the following instruction:

*A BID ALTERNATE shall be bid by indicating either a dollar amount or the words “No Change”, “Zero”, or “0.00”.*

The issues are not the permissibility, but the responsiveness and reasonableness of such a quotation. Section 11-35-20 of the Code defines the underlying public purposes and policies of the Code, including”:

*(a) to provide increased economy in state procurement activities and to maximize to the fullest extent practicable the purchasing values of funds while ensuring that procurements are the most advantageous to the State...*

In the area of construction, this fundamental public goal is normally achieved through the award of contracts to the lowest responsive and responsible bidder in accordance with the competitive sealed bidding process as described in §11-35-3020 of the Code:

*...(2)(c) In lieu of Section 11-35-1520(10) the following provisions apply. Unless there is a **compelling reason to reject bids** as prescribed by regulation of the board, notice of an intended award of a contract to the lowest **responsive** and responsible bidder whose bid meets the requirements set forth in the invitation for bids shall be given by posting such notice at a location which has been specified in the invitation for bids. [emphasis added]*

Permissible reasons for rejecting bids are defined in Board Regulation 19-445.2070 of the SC Code of Laws, as amended, which states in relevant part:

*A. General Application.*

*Any bid which fails to conform to the essential requirements of the invitation for bids shall be rejected.*

*E. Price Unreasonableness. Any bid may be rejected if the procurement officer determines in writing that it is unreasonable as to price.*

The essential requirements for qualification as a “responsive bidder” are defined in §11-35-1410:

*...(7) “Responsive bidder or offeror” means a person who has submitted a bid or offer which conforms in all material aspects to the invitation for bids or request for proposals.*

Brantley contends that the bids submitted by Newton, Dawson and Palmetto were non-responsive by virtue of their inclusion of the value of Bid Alternates 2-5 within the Base Bid amount. The CPOC agrees and also includes the bid of Stenstrom within the scope of this determination. The Bid Form clearly required separate and distinct pricing for the Base Bid and the six Bid Alternates. Compliance with this requirement is an essential requirement of the competitive sealed bidding process. The Project’s *Instructions to Bidders* specifically disallowed the inclusion of the cost of the thermal storage tank within the Base Bid. These four bidders patently ignored the clear instructions of the Bidding Documents and did so at their peril. The bids of Newton, Dawson, Palmetto and Stenstrom are clearly non-responsive to a clear and clearly essential element of the solicitation and Citadel erred in not rejecting these bids on this issue.

The decision to post a Notice of Intent to Award to an otherwise responsive bidder requires that the procurement official determine two things: (1) that a prospective contractor is responsible; and, (2) that the prices offered are reasonable. While the primary focus of the requirement for “price reasonableness” is to ensure that the State does not pay unreasonably high prices, it is equally true that unreasonably low prices must be evaluated before an award is made. Low prices

may place the procurement official on notice of a potential mistake in the bid; or that the bidder does not understand the Work; or that the bidder intends to provide services of lesser quality or quantity than required.

In the case of Bid Alternates 2 and 4, six bidders provided pricing as shown below.

<u>Bidder</u>	<u>Alt 2</u>	<u>Alt 4</u>
Brantley	\$ 174,740	\$ 10
Charleston Const.	\$ 83,000	\$ 48,000
Edison Foard	\$ 79,800	\$ 46,200
Hitt Contracting	\$ 82,000	\$ 22,000
Infinger & Assoc.	\$ 84,000	\$ 49,000
J. A. Jones	\$ 163,200	\$ 60,480

In the case of Bid Alternate 2, the median price of the six bids was \$83,500. The CPOC considers that these six bids constitute adequate price competition and that \$83,500 represents a fair and reasonable price for the work of Bid Alternate 2. The CPOC considers the “0.00” bids of Newton, Dawson, Palmetto and Stenstrom for Bid Alternate 2 to be unreasonably low and Citadel erred in not rejecting these bids as non-responsive on this issue.

In the case of Bid Alternate 4 and excluding the bid by Brantley, the median price quoted by the remaining five bidders for Bid Alternate 4 is \$48,000. The CPOC considers that these five bids constitute adequate price competition and that \$48,000 represents a fair and reasonable price for the work of Bid Alternate 4. Without speculating on the reason(s) underlying its bidding strategy, the CPOC considers Brantley’s offer to provide the work of Bid Alternate 4 for \$10 is, on its face, unreasonably low. Citadel committed administrative error in not evaluating Brantley’s bid for price reasonableness.

### **ORDER**

It is the determination of the Chief Procurement Officer for Construction, pursuant to authority granted under Regulation 19-445.2085 of the SC Code of Laws that the solicitation for the Deas Hall Building Renovations Project is hereby canceled after award, but prior to performance, for ambiguous and conflicting Bidding Documents and administrative error on the part of the agency. The Citadel is hereby directed to restructure its Bidding Documents to resolve the ambiguities noted in this determination and may proceed to resolicit at such time as it deems fit, consistent with its programmatic needs.



*Michael M. Thomas*

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Michael M. Thomas  
Chief Procurement Officer for Construction

July 16, 2002  
Date

### **STATEMENT OF THE RIGHT TO APPEAL**

By canceling the intent to award prior to performance, this Decision also serves as a written determination under Section 11-35-1520(7) and Regulation 19-445.2085(C). The South Carolina Procurement Code, under Section 11-35-4410, subsection (1)(b), states:

(1) Creation. There is hereby created The South Carolina Procurement Review Panel which shall be charged with the responsibility to review and determine *de novo*:

...

(b) requests for review of other written determinations, decisions, policies, and procedures as arise from or concern the procurement of supplies, services, or construction procured in accordance with the provisions of this code and the ensuing regulations; provided that any matter which could have been brought before the chief procurement officers in a timely and appropriate manner under Sections 11-35-4210, 11-35-4220, or 11-35-4230, but was not, shall not be the subject of review under this paragraph. Requests for review under this paragraph shall be submitted to the Procurement Review Panel in writing, setting forth the grounds, within fifteen days of the date of such written determination, decisions, policies, and procedures.

Additional information regarding the administrative review process is available on the internet at the following Web site: <http://www.state.sc.us/mmo/legal/lawmenu.htm>